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RECORD, CASE NO. 14696.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM NO. 795.

THE UNITED STATES, APPELLANT,

vs.

HENRY H. TAYLOR.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TENNESSEE.

FILED JUNE 22, 1891.

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INDEX.

	Original.	Print.
Petition	1	1
Affidavit of mailing copy of petition to Attorney-General	7	4
Registry receipt	7	4
Affidavit of service of copy of petition on district attorney	8	5
Answer	9	6
Conclusions of the court	9	6
Decree	27	16
Order allowing appeal	31	19
Clerk's certificate	32	19

1 *To the judges of the circuit court of the United States of the northern division of the eastern district of Tennessee.*

HENRY HARRISON TAYLOR
vs.
THE UNITED STATES.

The claimant in this, his petition, respectfully shows to the court as follows: That he is a citizen of the United States, a resident of the city of Knoxville, said city being within the northern division of the eastern district of Tennessee; that from July 1st, 1887, to the present time he was properly appointed and qualified clerk of the United States circuit court for said district, with all the rights, powers, and emoluments belonging to said office.

Your petitioner further shows that he has regularly discharged the duties of said office since the date of his appointment, and that in so doing certain fees became due to him from the United States; that he has rendered to the First Auditor of the Treasury accounts for his services, but did not include therein certain charges for services, which charges and the reasons for not presenting will be hereinafter shown. That your petitioner would receive in reply to said accounts certain "Statements of Accounts" from the First Comptroller of the Treasury, in which large amounts of fees earned and due to your petitioner were disallowed under the rulings or said First Comptroller; said "Statements of Accounts" from the Comptroller are copies of originals in his office, and are each numbered by said Comptroller, and will be herein referred to by said numbers; and said copies furnished your petitioner will be exhibited on the trial of this cause, or at an accounting, if the court should direct such to be had.

Your petitioner further shows that the following are the amounts
2 due to him, which have become due during a period from July 1st, 1887, to June 30th, 1889, and have been disallowed since the passage of the act under which this suit was brought, and that all of said charges have received the approval order of court, and were not otherwise objected to except as to the legality of the fees charged and necessity for the performance of the services:

First. All charges in excess of one acknowledgement to defendants' recognizance disallowed. These acknowledgements are taken jointly, for which the clerk is entitled to 25 cents.

In Statement No.	105313	$3.50
"	106275	16.00
"	108428	6.25
"	110062	3.75
"	110987	6.00
"	112529	5.25
Total		40.75

Second. All charges for taking acknowledgements disallowed.

In Statement No.	114,359	$5.75

Third. All charges for certificates and seals to copy, for marshal, ot order to pay witnesses, disallowed as unnecessary.

In Statement No.	105313	$0.40
" "	110987	.60
" "	112529	.60
" "	113295	.60
" "	114359	.40
" "	115953	.40
Total		3.00

Fourth. Filing orders from district attorney discharging witnesses, each order containing on the reverse side the affidavit of the witness as to mileage and attendance and the jurat of the clerk.

3	In Statement No.	105313	$28.70
	" "	108428	27.20
	" "	110062	20.70
	" "	115953	18.90
	Total		95.50

Fifth. All charges for filing papers from United States commissioners in excess of one filing for each case disallowed.

In Statement No.	106275	$26.50
" "	106887	11.00
" "	108428	39.50
" "	110062	21.40
" "	110062	42.90
" "	110987	57.50
" "	112529	7.80
" "	112816	26.60
" "	114359	52.20
Total		285.40

Sixth. All charges for certificates and seals to copies of commitment to jail, summons, and declaration.

In Statement No.	106275	$12.60
" "	108428	8.90
" "	112529	.20
" "	115953	3.60
Total		24.40

Seventh. For order of court to marshal to proceed to jail in some other county than the one in which the court is held and bring prisoner into court only 25 cents allowed.

In Statement No.	106275	$7.75
" "	114359	21.60
Total		29.35

Eighth. Docket fees in contempt cases suspended because attachments were for witnesses.

In Statement No.	106275 $6.00

4 Ninth. Final records disallowed as unnecessary.

A.—Bonds and subpœnas.

In Statement No.	106887 $64.70

B.—Affidavits, warrants, and subpœnas.

In Statement No.	108428 $136.20

C.—Captions to terms.

In Statement No. 108428	$30.75
" " 110062	11.25
" " 114359	52.35
Total	94.35

D.—All alias capiases, except one in which arrest is made.

In Statement No. 110062	$7.80

E.—All papers from Commissioner.

In Statement No. 110062	$53.25

F.—Bonds taken after indictment.

In Statement No. 110062	$6.90

G.—Affidavits, warrants, bonds in excess of two folios, all subpœnas, captions of term and day, journal entries, capiases in excess of two folios, mittimus.

In Statement No. 110987	$151.65

H.—Capias in excess of two folios, subpœna, and minutes.

In Statement No. 112529	$66.30

I.—In nine cases, three folios each, disallowed without reason given.

In Statement No. 114359	$4.05

J.—Complaints, $30.90; warrants, $49.20; subpœnas from commissioner, $11.60; subpœnas from clerk, $8.70; mittimus, 45 cts. All the foregoing in

Statement No. 114359	$103.85

K.—Convening order for term and recognizance, mittimus to court.

In Statement No. 115953	$24.45

5 Tenth. Entering respites of jury while trial in progress, nothing allowed.

In Statement No. 110062	$1.80
" " 113295	3.60
" " 106275	0.75
Total	6.15

Eleventh. Case against J. E. Condra, error charged in extension, but my copy does not show any error.

In Statement No. 110062	$3.00

Twelfth. Affidavits of witnesses, one folio each witness.

In Statement No. 110062	$31.05
" " 115953	28.35
Total	59.40

Thirteenth. All charges for seals on orders to marshal to bring prisoners to court, $5.40.

Fourteenth. Charges for 71 capiases suspended for explanation as to necessity for same; explanation made, but no additional allowance given petitioner.

In Statement No. 114359	$88.75

Fifteenth. Charge for issuing certified copy in Tally and Priddy case, and more than one mittimus for Hamilton County jail in the same case.

In Statement No. 115953 ..... $2.20

Sixteenth. Your petitioner further shows that the following item was omitted from one of his accounts and has not yet presented to the Comptroller's Office, because your petitioner knew that it was at that time the practice of the Comptroller to disallow this charge. Taking affidavit of two hundred and forty-three witnesses at October term, 1887, at Chattanooga, one folio each.

Filing two hundred and forty-three discharges, as above $24.30
Two hundred and forty-three affidavits, at 15 cents 36.45

6 The claimant shows further that he is the sole and legal owner of the said claim; that no assignment or transfer of said claim or of any part thereof or interest therein has been made; and that no action has been taken on said claim other than is set forth in this, his petition, and that he is justly entitled from the United States to the amount claimed in this his, petition, without any just credits or off-sets.

Wherefore the premises considered, the claimant demands judgment against the defendant for one thousand four hundred and twenty-nine dollars and thirty cents ($1,429.30), that being the amount of the particulars hereinbefore set forth; and he prays that the court on the facts will find him to be so entitled and give him judgment accordingly.

(Signed) H. H. TAYLOR,
Petitioner.

(Signed) R. N. HOOD,
Attorney for Claimant.

UNITED STATES OF AMERICA,
Eastern District of Tennessee:

Henry H. Taylor, on oath says that he is the claimant named in the foregoing petition; that he is acquainted with the contents of the petition, and that the facts and matters therein stated are true to the best of his knowledge and belief.

(Signed) HENRY H. TAYLOR.

Subscribed and sworn to before me this 23rd day of December, 1889.

(Signed) HU. L. MCCLUNG,
Clerk U. S. Dist. Court.

(Court seal.)

(Endorsed:) No. 872. In the circuit court of the United States for the northern division of the eastern district of Tennessee. H. H. Taylor, clerk, vs. The United States. Petition. Filed Dec. 23, 1889, H. H. Taylor, clerk. By J. T. Carter, D. C. R. N. Hood, att'y for claimant.

7 *Affidavit of J. T. Carter, deputy clerk.*

UNITED STATES OF AMERICA,
Eastern district of Tennessee, ss:

I, J. T. Carter, deputy clerk of the United States circuit court for said district, do solemnly swear that I have this day sent to the Attorney-

General of the United States, by registered mail, a full, true, and perfect copy of the original petition this day filed in my office in the case of Henry H. Taylor vs. The United States.

(Signed) J. T. CARTER,
Deputy Clerk.

Sworn to and subscribed before me this 23rd day of December, 1889.

(Signed) HU. L. MCCLUNG,
Clerk, U. S. D. Court.

(Court seal.)

(Endorsed:) No. 872. Henry H. Taylor vs. The United States. Affidavit of J. T. Carter, deputy clerk. Filed Dec. 23, 1889, H. H. Taylor, U. S. cir. c't cl'k.

Registry receipt, attached to affidavit of J. T. Carter, D. C.

Post-office at Knoxville, Tenn.

Registered letter No. 1750. Rec'd Dec. 23, 1889, of H. H. Taylor, cl'k, addressed to Hon. Att'y Gen'l of U. S., Washington, D. C.

(Signed.) J. L. HUDIBURG, *P. M.*

Registry return receipt sent Dec. 23, 1889.

Reg. No. 1750. From post-office at Knoxville, Tenn.

Reg. letter addressed to Hon. Att'y Gen'l U. S., post-office at Washington, D. C.

After obtaining receipt below, the postmaster will mail this card, without cover and without postage, to address on the other side.

Received the above-described registered letter.

(Sender's name on other side.)

Sign on dotted lines to the right.

W. H. H. MILLER.
12,169.

When delivery is made to other than addressee, the name of both addressee and recipient must appear.

J. J. HAMEY.

8 (Reverse side.)

When the registered letter or parcel accompanying this card is delivered the postmaster will require signature to the receipt on the other side, also on his record of registered deliveries, and mail this card without cover to address below. A penalty of $300 is fixed by law for using this card for other than official business.

Post-Office Department.
Official Business.
Post Office at
Return to:

Stamp here name of post-office.

Washington, D. C., Dec. 27, '89.

and date of delivery.

Name of sender, H. H. Taylor, clerk.

Street and number or post-office box ———. Post-office at Knoxville, county of Knox, State of Tennessee. Filed Jan. 2, 1890. H. H. Taylor, U. S. cir. ct. clk., and attached to affidavit of J. T. Carter, deputy clerk.

Affidavit of Jasper H. Peoples, deputy U. S. marshal.

H. H. TAYLOR, CLERK,)
vs.)
THE UNITED STATES.)

In the United States circuit court for the northern division of the eastern district of Tennessee.

In the above-entitled cause personally came before me Jasper H. Peoples, a deputy United States marshal in and for the division and district aforesaid, and, being by me duly sworn, made oath that he did this day deliver and serve upon H. B. Lindsay, United States district attorney for the eastern district of Tennessee, a duly certified copy of the petition in the above-styled cause, filed in the United States circuit court for the northern division of the eastern district of Tennessee, on the 23rd day of December, 1889.

(Signed.) JASPER H. PEOPLES,
Deputy U. S. Marshal in and for said District and Division.

Sworn to and subscribed before me this 23rd day of December, A. D. 1889.

HU. L. MCCLUNG,
Clerk U. S. D. Court.

(Court seal.)

(Endorsed:) No. 872. H. H. Taylor, clerk, vs. The United States. Affidavit of Jasper H. Peoples, U. S. deputy marshal. Filed Dec.
9 23, 1889. H. H. Taylor, U. S. cir. ct. clk.

Answer.

The answer of the United States to the petition filed in the United States circuit court for the northern division of the eastern district of Tenn. against the U. S., and numbered 872 on the dockets of said court, by H. H. Taylor.

For answer to said petition, defts., the U. S., say that they admit that petitioner, H. H. Taylor, is and was at the time the services sued for in said petition were performed the clerk of the U. S. circuit court for the eastern dist. of Tenn. and that he performed the services sued for, but defts. deny that the same were necessarily done or that there is or was any laws authorizing the payment of the fees sued for, or that the defts. is indebted to petitioner in any amount on account thereof.

(Signed) H. B. LINDSAY,
U. S. Dist. Atty.

(Endorsed:) No. 872. In the circuit court for the United States for the northern division of the eastern district of Tenn. H. H. Taylor, clerk, vs. The United States. Answer. Filed July 2, 1890. H. H. Taylor, U. S. cir. ct. clk.

Conclusions of the court.

[Circuit court of the United States, eastern district of Tennessee, northern division.]

HENRY HARRISON TAYLOR
vs.
THE UNITED STATES. } No. 872.

R. N. HOOD,
Attorney for Plaintiff.
H. B. LINDSAY,
Dist. Atty. for Defendant.

March 14th, 1891.

This is an action brought by petition filed December 23, 1889,
10 for the recovery of fees due plaintiff as clerk of this court for services rendered by him on behalf of the United States between July 1st, 1887, and the date of the filing of the petition. The proceeding is instituted under the provisions of the act of Congress approved March 3rd, 1887, 24 Stats., 505, and all the jurisdictional requirements of the statute seem to have been complied with.

The defendant, for answer to this petition, admits the performance by the clerk of all the services the fees for which are here sued for, but denies "that the same were necessarily done, or that there is or was any law authorizing the payment of the fees sued for, or that the defendant is indebted to petitioner in any amount on account thereof." The fees here in controversy have all been duly and upon oath presented to and approved by the court in his regular quarterly or semiannual fee bills as required by the act of Congress approved February 22, 1875 (Supplt. Rev. Stats., pp. 145-147), and have been disallowed at the Treasury Department in Washington by the First Comptroller, and have not been paid.

The amount sued for by petitioner is the sum of $1,429.30.

But the following items therein have been allowed at the Treasury since the commencement of the suit and are of course withdrawn:

Certificates and seals on mittimus copies	$3.60	
Captions to terms in final records	52.35	
Orders, recognizances, and mittimus writs	24.45	
Affidavits to witnesses as to fees	28.55	
Fees on 71 capias writs	88.75	
Making	197.50	
And the clerk in subitem J has made an error of	3.00	
		200.50
Leaving in controversy the sum of		1,228.80

1. Items 1 and 2 of this petition are fees for taking the acknowledgements, in criminal cases, of defendants and their sureties to bail
11 bonds for appearance before the court for trial, such defendants having been duly arrested by the marshal under proper process and taken before the clerk for bail. In six of the accounts in which acknowledgement fees are disallowed a single fee for acknowledgement by the defendant and his sureties has been allowed by the Comptroller "for which the clerk is entitled to 25 cents," according to the Treasury statement, while in the other account all such fees are disallowed. Previous to the late First Comptroller of the Treasury, this fee for an acknowledge-

ment taken to a bail bond by each and every party to it was never questioned and all such fees were always allowed and paid; and the rulings on this point during his administration, and since, as this record shows, have not been uniform.

The statute fee for this service prescribed for clerks (Rev. Stats., sec. 828) and commissioners (Ibid., 847) is as follows: "For taking an acknowledgment, twenty-five cents." Now what is an acknowledgement? The definition given in Bouv. Dict., vol. 1, p. 56, is: "The act of one who has executed a deed, in going before some proper officer or court and declaring to it be his act or deed." It is the act, not of the officer, but of the person acknowledging, and one person can acknowledge only for himself, not for another, even though that other, at the same time and before the same officer, acknowledge to the execution of the same instrument.

"Taking an acknowledgement" is the act solely of the court or officer receiving from the party who has executed the bond or other instrument his formal admission of record that the execution thereof by him is his veritable act and deed. The function of an acknowledgement by a party to a writing is to authorize it to be given in evidence against him, or to be otherwise used in a court without further proof of its execution, as in case of the forfeiture of bail and other like proceedings; and the act
12 of the party acknowledging is strictly personal and can affect only himself and his own liability. Nor is it an uncommon occurrence in our courts for the principal to acknowledge the bail bond before one officer and the sureties before another, for the convenience of the parties; nor for one commissioner to take the acknowledgements of some of the sureties and a different commissioner those of the others. And this is especially true of the acknowledgements of a deed for record by different grantors, in different States or localities, before different officers, at different times, as all know who are familiar with conveyancing.

The "form for commissioners' accounts for fees" found in the Register. Department of Justice, ed. 1866, p. 285, "compiled by authority of the Attorney-General" and issued periodically from his office, embodies "instructions" for the court officers, and the "regulations prescribed by the accounting officers of the Treasury Department" to be observed in rendering accounts against the Government, have for nearly twenty years, in terms, recognized the claim of the plaintiff here. After providing a fee for "drawing bond for appearance of defendant," the form in its very next line prescribes the charge for "taking acknowledgments at 25 cents each."

In Barber vs. U. S., 35 Fed. Rep., 886, 888, the court allowed the commissioner there suing the fee of 25 cents for each person, principal and surety, acknowledging the bail; and such was the ruling in Rand vs. U. S., 36 Fed. Rep., 671, 674; in Crawford vs. U. S., 40 Fed. Rep., 446, and in McKinstry vs. U. S., 40 Ibid., 813, per Justice Lamar and Judge Pardee, as well as in Goodrich vs. U. S., 42 Fed. Rep., 392–394, and Marvin vs. U. S., 44 Fed. Rep., 405, 411. I am aware of the adverse decisions of Judge Toulmin in Strong vs. U. S., 34 Ibid., 17, and McKinstry vs. U. S., 34 Ibid., 211, in the district court, but in the latter case, on motion for a new trial, the fees were afterwards allowed upon argument before the circuit justice and the circuit judge, thus
13 establishing the commissioner's right to them in the fifth judicial circuit. And in Haywood vs. U. S., 37 Fed. Rep., 764, a fee for

but one acknowledgement was allowed for all the acknowledgements to a bond; but this is the only case so holding, and the only other one reported which does not allow the fee for each acknowledgement. Upon principal therefore, as well as upon authority, the amount here charged by the plaintiff, $46.50, ought to be recovered by him.

11. The next items (3 and 13) to be considered are fees for certificates of the clerk and seals of the court to certain copies of orders made by the court directing the marshal to pay jurors, witnesses, etc., and amounting to only $8.40. Sec. 828, Rev. Stats., prescribes the rate of such fees as follows: "For making any record, certificate, return, or report, for each folio, fifteen cents," and "for affixing the seal of the court to any instrument when required, twenty cents." These services were rendered under Rev. Stats., sec. 855, which is as follows: "In cases where the United States are parties the marshal shall, on the order of the court, to be entered on its minutes, pay to the jurors and witnesses all fees to which they appear by such order to be entitled, which sum shall be allowed him at the Treasury in his accounts," and the charges are according to these provisions of the statute. The folio fees for making the copies were not questioned at the Department, as confessedly they were proper and necessary, but only the fees for their authentication. This very question was presented to Judge Shiras for decision in Van Duzee vs. U. S., 41 Fed. Rep., 571, 575–6, who says: "What is the evidence of such order, except a copy thereof duly certified to by the clerk, with the proper seal attached? The copy, to be of value, must be duly certified to, and the usual and proper form is to attest the correctness thereof by the signature of the clerk with the seal attached. * * * Therefore, when a copy of the order directing the payment of witnesses and jurors is furnished to the mar-
14 shal, it should be so authenticated as to be evidence to him, and also for him, as need may arise, of the order as it stands upon the records of the court, and this can only be done by having the copy duly certified by the clerk with the seal attached.

In Jones vs. U. S., 39 Fed. Rep., 410, 412, the fees for such certificates were allowed, but those for the seals were disallowed, though with hesitation, and without any reason being given for the disallowance, or any distinction assigned for the difference between them. And similar fees for authentication of copies of orders approving accounts of court officers have been allowed in Stanton vs. U. S., 37 Fed. Rep., 254; Ewan vs. U. S., Ibid, 470; and Goodrich vs. U. S., 42 Ibid, 392, 394; Marvin vs. U. S., 44 Fed. Rep., 405, while no reported case found has ever held otherwise. And, upon principal, a court of record can only speak from its record; and when the original can not be used can only speak, outside of the court, from a copy of the record duly authenticated. Its clerk is custodian of its seal, and while he and its other officers, including the judge himself, may change, its record and its seal always remain. Such is the law now and such was the common law, the general principal being that when copies of a court record are to be used as evidence elsewhere the highest form of authentication known to the law should be employed; and this is generally so by statute as to copies obtained for such use from the Department offices, the land offices, the Patent Office, foreign courts, State courts, etc., which all have seals, the proof of the copy being "by

the attestation of the keeper * * * and the seal of his office annexed." U. S. Rev. Stats., sections 460, 461, 886, 888, 889, 892, 893, 905, 906, 907.

The like items (6 and 15) for authentication of copies of mittimus writs issued out of the court, and amounting to $23.00, should also be allowed the plaintiff upon like reasoning. The fees for the copies themselves have been allowed. Section 1028 of the Revised Statutes provides that "whenever a prisoner is committed to a sheriff or jailer by virtue of a writ, warrant, or mittimus, a copy thereof shall be delivered to such sheriff or jailer as his authority to hold the prisoner, and the original writ, warrant, or mittimus shall be returned to the proper court or officer, with the officer's return thereon." The original writ must be issued under the seal of the court (Rev. Stats., 911, 912), and a copy of it of course can only be certified by the clerk, who is custodian of the seal, who alone can issue the writ, and who has charge of and makes the record authorizing its issuance. A copy not authenticated by such certificate and seal would not in law be a compliance with the statute quoted. The record here shows, however, that other items originally embraced in the petition have since its filing been allowed and paid, and therefore there is really no contest about the items.

IV. The items (4 and part 16) for filing discharge tickets of the district attorney amounting to $119.80. They are made on formal blanks addressed to the clerk, dated in and issued out of the district attorney's office and signed by him, whereby the clerk is officially notified that the witness of the Government named therein "is hereby discharged as a witness on behalf of the United States," either finally or until the term or date specified, and this is filed by the clerk, the fee for which is charged at ten cents under section 828 of the Revised Statutes, which gives "for filing and entering every declaration, plea, or other paper, ten cents."

For many years witnesses for the Government in the districts of Tennessee have been summoned to attend the Federal courts in strict conformity to sec. 877, Rev. Stats., which is as follows: "Witnesses who are required to attend any term of a circuit or district court on the part of the United States shall be subpœnaed to testify generally on their behalf, and not to depart the court without leave thereof or of the district attorney, and under such process they shall appear before the grand or petit jury, or both, as they may be required by the court or the district attorney." As a matter of fact and of practice, the court has really nothing whatever to do with the discharging of Government witnesses, nor can the clerk know when the district attorney has no further need of a particular witness. One may be, and often is, a witness in many cases. The clerk must know by some proper evidence when the attendance of each witness is no longer needed in order to safely certify his fees to the marshal for payment, else all would remain in attendance to the end of the session, at useless and enormous expense, and in contravention of the very intent and spirit of the act quoted. If witnesses in Government cases, as in other suits, were severally summoned in each one, of course the clerk could safely certify their fees at the close of the trial. But under this statute and our practice the district attorney can alone know when a Government witness is at liberty "to depart the court," and this discharge notice or ticket is the clerk's evidence and only information that any such

witness has the statutory "leave of the district attorney" to so depart. No Comptroller, except one, has ever disallowed or questioned these fees, and the Government would seem to be in no attitude to now question them after the services for which they are prescribed by law have been performed by the clerk at the instance and request of the highest law officer of the court under a practice sanctioned and adopted by himself.

Judge Benedict, In re Keller, 36 Fed. Rep., 677, 681, uses this language in allowing the claim of a stenographer in criminal cases under the district attorney's employment which is peculiarly pertinent here: "The equity of the petitioner's case is strong. He rendered the services in question in the same manner in which he had rendered similar services for a long period of time, for which he had always been paid by the Govern-
17 ment. No intimation was conveyed to him that his employment was considered irregular. His services were accepted in behalf of the Government, and his bills allowed by the district attorney," and in the case In re Clerk's Charges, 5 Fed. Rep., 440, it was held (to cite from the syllabus), that "Services by a clerk of a United States court, whether ordered by the duly appointed officers of the Government or imposed by a statute of the United States, are proper charges against the United States if such services are covered by the terms of the fee bill." These fees therefore ought to be allowed without any question.

V. Affidavits of these Government witnesses are taken severally by the clerk as to the number of days they have attended the court and the number of miles traveled, the fees for which affidavits amount to $67.50 (Item 12 and part 16). These services are usual and highly proper and the fees therefor are according to the statute. The claim of the witness is thus based upon his oath as to the facts, and the evidence of the clerk's care in the premises is preserved as a part of the records of the court. Similar items originally embraced in this petition have since been allowed by the accounting officers of the Treasury as this record shows, so that the justice of this item and the plaintiff's right to recover is conceded by defendant.

VI. Of course the small error in addition of $3.00 (Item 11) against the clerk made in the Comptroller's office is allowed, just as was the clerk's like error in his favor in his petition disallowed to him heretofore. It would seem that one ought not to be compelled to resort to the courts of the United States for the correction of such errors as this.

VII. Item 5 seeks a recovery of $285.40 fees for filing commissioner's papers in criminal cases in which there have been examinations of persons for violations of the Federal statutes who have been held bail to answer indictments or other modes of prosecution in this court therefor. These fees have been charged at the statute rate of ten cents for each paper
18 so filed; but the Comptroller has disallowed for all filings except a single one in each. These papers the petitioner shows, and the plea admits, were each seperately filed and so marked by the clerk.

The authority for such preliminary examinations is found in section 1014, Rev. Stats. It is as follows: "For any crime or offense against the United States, the offender may be by any * * * commissioner of a circuit court to take bail, * * * or other magistrate of any State where he may be found and agreeably to the usual mode of process against offenders in such State, and at the expense of the United States be arrested

and imprisoned or bailed, as the case may be, for trial before such court of the United States as by law has recognizance of the offense. Copies of the process shall be returned as speedily as may be into the clerk's office of such court, together with the recognizance of the witnesses for their appearance to testify in the case."

The provisions of the code of Tennessee prescribe and regulate with great minuteness all the details attending such examinations "of persons charged with public offenses" before justices of the peace and other officers. Code of Tenn. (M. & V.), secs. 5844–5900, and section 5898 thereof contains this provision: "All examinations and undertakings by parties or witnesses taken under this chapter shall, together with the warrant and other papers, be returned by the magistrate to the court at which the defendant or witness is bound to appear by the first day of said court."

In reality these provisions of the Tennessee code and of the United States Revised Statutes are in no way different, except that "copies" of "process" instead of originals are required to be sent to the court. The word "process," as used in this section (R. S., 1014), must ex necessitate mean any writ issued by the commissioner for service, and includes
19 the warrant, the subpœnas, and the mittimus writs, temporary and final; and the "recognizances" or bonds of the defendant and witnesses in the case are equally within the very terms of this statute. All such fees have always been allowed, except under a single Comptroller, since the enactment of the statute in 1853.

Besides, the rules of the Federal courts in this State provide that such commissioner, at the close of a case, shall "transmit, as soon thereafter as possible, all the papers in the case to the clerk of the court for inspection and preservation."

This matter has been the subject of consideration by several of the circuit courts. Judge Bruer ruled, in Goodrich vs. U. S. (35 Fed. Rep., 194) that a clerk was entitled to the fee of ten cents for filing a report required of him by law, and a like fee for filing each of the 148 vouchers filed therewith. He says: "It is contended by the Government that this report and vouchers should be taken as one paper and he be allowed for filing that one paper only. But in fact each voucher was a different paper and related to a distinct transaction, and the statute allowed him for filing and entering every declaration, plea, or other paper, ten cents. Of course this means for each separate paper that is filed, and therefore he is entitled to the full amount claimed."

In Dimmick vs. U. S. (36 Fed. Rep., 83) the exact question as to filing papers sent up by commissioners was before the court, and the amount claimed was allowed for the filing of each paper, on the ground that "it was manifestly the duty of the clerk to file all of the papers referred to," and "it was equally his duty to mark these papers filed in the usual manner. * * * It would be an unsafe precedent to follow the suggestion of the Comptroller that only the outside paper or wrapper should be filed, the entire package or file being made up of separate papers, although appertaining to the same case or matter." Upon substantially the
20 same reasoning the following cases have been decided against the United States: Erwin vs. U. S. (37 Fed. Rep., 470, 480–1); Jones vs. U. S. (39 Fed. Rep., 410, 412); Marvin vs. U. S. (44 Fed. Rep., 405). In Van Duzee vs. U. S. (41 Fed. Rep., 571) the court thus comments upon

the ruling of the late Comptroller: "These were not parts of one paper before the commissioner, but were separate and distinct, and they remain so when sent to the clerk. He is under no obligation to fasten them together, and if for convenience he does so, there is no magic in a brass fastening or the more venerable red tape which can convert these papers into one. * * * As I can see no legal foundation for the bundling theory advanced on behalf of the defendant, the conclusion is that the plaintiff is entitled to recover the statutory fee for filing the several papers."

There is no doubt therefore that the petitioner's claim here is just and legal, and the decree in this case should so award.

VIII. The item (No. 7) of $29.35, for copies of orders made by the court upon the marshal to bring prisoners to the court for trial is confined to instances only where the prisoners have been committed by commissioners for trial to the jails of counties other than that in which the court is held. After the marshal has so executed the commissioner's mittimus writ, it is returned to him and a copy transmitted to the clerk (R. S., 1014). The writ upon its return is functus officio and no further service can be had under it. The copy filed with the jailer is his. The marshal can not take the prisoner from such jail and transport him, it may be for a long distance, without process. Nor do I think that section 1030 of the Revised Statutes applies to such cases. It is as follows: "No writ is necessary to bring into court any prisoner or person in custody, or for remanding him from the court into custody; but the same shall be done on the order of the court or district attorney, for which no fees shall be charged by the clerk or marshal."

21 This provision and sec. 877, Rev. Stats., above quoted, are taken from section 3 of the act of February 26, 1853, 10 Stats. at Large, 169, and were originally a single clause; the first sentence of which applied to the summoning of witnesses generally on behalf of the United States, their attendance at the court before the grand and petit juries, as required by the court or district attorney, until discharged by the court or district attorney. Then follows the provision in question that "no writ shall be necessary to bring into court any prisoner or person in custody (meaning, of course, a witness held in default of bail) or for remanding him from the court into custody." All this clause of the original section of the act seems, therefore, to relate to prisoners and witnesses after their arrival and while in attendance upon a session of the court. The separation of the provisions into different sections (877 and 1030) of the revision in no way affects their construction, Rev. Stats. sec. 5600.

It would be unreasonable to presume that this provision was intended by Congress to impose upon a marshall the burden and expense of transporting prisoners from distant counties to the court for trial without compensation or without the allowance of even such expenses as would be necessarily incurred by him. Here the removals were made, each under an "order" of the court, as the statute provides. And in construing this statute the court, in Erwin vs. U. S., Fed. Rep., 37, 470–486–7, unhesitatingly comes to the same conclusion after a careful and pain-staking examination of the whole subject and a review of all these statutory provisions. This construction limiting the operation of section 1030 to the place where the court is held, seems to be the only reasonable one which can be given it without working hardships never contemplated by Congress. And where

the construction of these fees statutes "admits of two interpretations, the words should be construed liberally in favor of the officer and not strictly in favor of the United States." McKinstry v. U. S., 40 Fed. Rep., 22 813. Opinion per Judges Lamar and Pardee. These fees should therefore be allowed the plaintiff here.

IX. An item (No. 8) of $6.00 was disallowed the plaintiff by the Comptroller for "making dockets and indexes, taxing costs," etc., in cases against witnesses for contempt. The fees for such services are prescribed by section 828, Revised Statutes, which gives $3.00 in a case in which there is issue and testimony, $2.00 where there is issue but no testimony, and $1.00 in cases dismissed or discontinued. The statute is general in its terms and applies to any "cause," making no distinction or exception. The record here shows that these cases were brought at the instance of the Government, as plaintiff, that they were docketed and indexed just as other cases in the court are.

In Bouv. Dict., Vol. I, "Cause" is defined to be "In practice: a suit or action, any question civil or criminal, contested before a court of justice." In Erwin vs. U. S., 37 Fed. Rep., 470, 479-80, where the question whether a clerk was entitled to fees for making final records in such cases was decided in the affirmative, Judge Speer citing Blyew vs. U. S., 13 Wal., 581; ex parte Kearney, 7 Wheat., 38, and Hayes vs. Fisher, 102 U. S., 121, says, "a proceeding for contempt is a distinct and independent suit," and to the same effect is Goodrich vs. U. S., 42 Fed. Rep., 392, 395. This disallowance by the accounting officers can not be properly sustained, and the amount is, of course, allowed plaintiff.

X. The item (No. 10) of $6.15 is for entering "respites of jury" or orders of continuance from day to day while criminal trials were in progress. Such orders are not only proper, but necessary; and a conviction at the close of a long trial would doubtless be a nullity where the record did not show such entries. Section 828, Revised Statutes, gives the clerk "For entering any * * * order, continuance (etc.), for each folio, fifteen cents," the rate of fee charged here for the work actually done. There was no merit whatever in the disallowance by the Comp-23 troller and the clerk is entitled to judgment for the same.

XI. The remaining item of the petition is for the recovery of *of* fees for making final records in criminal cases, the Department disallowances extending only to certain portions of such records. In some instances fees for recording specified papers are wholly disallowed, and in others only partially so, the accounting officers assuming for themselves to determine the number of folios contained in a given portion of the record without regard to fact. The question of the necessity of making final records was not mooted at the Treasury, is not denied here, and of course could not be.

Archl. Cr. Pl., 127; 1 Bish. Cr. Proc., sec. 905, 913; U. S. Rev. Stats., sec. 750, U. S. Sup. Court Rules; Admiralty, 52; Law., 8. Rule 12 of the circuit courts of Tennessee, promulgated in 1864, with others, by Judge Trigg on the reëstablishment of the courts about the close of the war, enumerates what in law and equity cases shall be entered upon the final record. Baine vs. Home Ins. Co., 30 Fed. Rep., 667.

These records were always required at common law (3 Black. Com., 24) have always been made in the courts of the United States and of this

State until a recent act of the legislature made them unnecessary except in certain instances. But that act, of course, has no application to criminal records in the Federal courts of Tennessee, U. S. v. Reid, 12 How., 361; U. S. vs. Jones, 10 Fed. Rep., 469; U. S. Kilpatrick, 16 ibid., 765.

The amount of $4.05 disallowed without assignment by Comptroller of any reason therefor in his statement to the clerk, is, of course, allowed him here, as well as the item of $42.00, his fees charged at the rate of fifteen cents per folio under the statute for the usual captions to the records, and the items of $7.80 and $66.30, like fees for recording capias writs, etc.

As to these last three items, there is really no contest between the
24 parties, plaintiff and defendant here, as similar items originally sued for in the petition have been withdrawn, because since allowed at Washington. There is, however, no doubt whatever that these captions and capias writs are essentially necessary portions of the final record in a criminal case.

The sums of $64.70 and $6.90, fees for entering upon the record the bail bonds of defendants, should be allowed. The bail bond in a criminal case is the same in effect as the defendant's recognizance, the former being entered into before an officer authorized to take bail, and filed in the case, and the latter a similar undertaking of record. As to the necessity of the entry of the recognizance upon the final record there can be no doubt; and it can not be that the mere form of the undertaking can create any difference in this regard. Besides, the capias writ with the marshal's return thereon, like the original summons or writ at law, was always entered upon the final record, and the bail bond is technically a part of the return of the marshal to the capias and is returned by him and *and* filed with it. The return always shows, when the writ is executed, the arrest of the defendant and either his commitment for trial or that he was taken before some proper officer before whom bail was given and the bail returned to court in defendant's stead, his sureties therein becoming in law his custodians or jailers.

The remaining amounts, aggregating $441.90, are fees for entering upon the final record the papers filed in a case and sent to the court by the commissioner who held the defendant in bail upon preliminary examination. As has been seen, these papers are required by statute to be transmitted to the court and filed. They are, in fact, the written evidence of the origin of the proceedings in the case. It is a mistake to suppose that the filing of an information by a district attorney or the return by the grand jury of

an indictment is the institution of a criminal case where the defend-
25 ant has been previously held to bail. The former can never be filed in court except upon the probable cause shown by a preliminary examination, the papers of which are in practice always filed with it, while the indictment, in such a case, is the legal statement by the grand jury of the charge which the defendant is already in court to answer either in his own proper person or by bail.

Nearly all the criminal prosecutions in this court are for violations of what are known as the internal revenue laws of the United States. Previous to July 5th, 1884, the statute of limitations within which such violations could be prosecuted was five years; but by an act of Congress approved on that date (23 Stats. at Large, 122) the limitation, with few

exceptions, was reduced from five to three years, the act containing the proviso, "that where a complaint shall be instituted before a commissioner of the United States, within the period above limited, the time shall be extended until the discharge of the grand jury at its next session within the district." Under this provission the date of the indictment might not determine whether the prosecution was instituted within the time limited by law, and its commencement must of course always be judicially ascertained by the record. It follows, therefore, that these papers used on such preliminary examinations and filed in a case become a part of it, and will often contain the sole evidence upon which this question can be resolved. Hence it would seem that upon being filed they are portions of the proceedings, and thereby become a part of the necessary technical record. As such it is the duty of the clerk to enter them upon the final record. His official oath requires the clerk to "truly and faithfully enter and record all the orders, decrees, judgments, and proceedings" of the court. (Rev. Stats., sec. 794.)

In Erwin vs. U. S., 37 Fed. Rep., 471, 488–9, Judge Spear allowed fees for entering upon the final record the "affidavit, warrant of arrest, marshal's return, and finding of commissioner of probable
26 cause, * * * commitment to jail in default of bond, recognizance in cases where given, and justification of surety," being in fact all the papers used on preliminary examination except the subpœnas and abstract of the testimony taken. And in Van Duzee vs. U. S., 41 Fed. Rep., 571, 577, it was ruled that "the final record shall include the order made by the commissioner binding the defendant to appear before the grand jury." These are the only cases reported since the act of March 3, 1887, I have been able to find containing rulings upon this precise question. For the plaintiff it may well be said here, that by no act of his do these papers become a part of the record of the case, and there is no intimation that there has been any effort on his part to make these records unnecessarily prolix. He has rendered the services charged for, the law prescribes a fee for the same, and he should be allowed these fees, less the amount charged ($162.80) for recording subpœnas which were never even in equity and admiralty entered upon the final record of a cause. (Rev. Stats., sec. 650; Sup. Court, Ad. Rule, No. 52.)

Perhaps upon this record a decision ought to have been reached at once, upon the ground that the defendant has shown no mistake of the court in the original approval of the accounts containing these fees, as held in U. S. vs. Jones, 134 U. S., 483, 488, when Mr. Justice Lamar, in delivering the opinion of the Supreme Court in a suit brought by a commissioner against the United States for his fees, says: "The approval of a commissioner's account by a circuit court of the United States, under the act of February 22, 1875, 18 Stats., 333, is prima facie evidence of the correctness of the items of that account; and in the absence of clear and unequivocal proof of mistake on the part of the court, it should be conclusive."

But as such a course would leave these questions to be hereafter decided upon the presentation of subsequent accounts containing like items
27 for approval by the court, it has been deemed the better course to thus examine the matter at length here; and the result is, that,

upon the whole case, a decree should be entered for the petitioner in accordance with the foregoing findings for the sum of $1,066.00 and costs, and it is accordingly so ordered.

(Signed) HOWELL E. JACKSON,
Circuit Judge.

(Endorsed:) No. 872. H. H. Taylor vs. The United States. Conclusions of the court. Filed March 17, 1891. H. H. Taylor, clerk. By J. T. Carter, deputy clerk.

Decree.

Be it remembered that at a circuit court of the United States, begun and held for the northern division of the eastern district of Tennessee, at the Federal court rooms in the city of Knoxville, within said district and the sixth circuit, on the second Monday, it being the 12th day of January, A. D. 1891.

Present and presiding, the honorable D. M. Key, judge of the United States district court for the eastern and middle districts of Tennessee, the following proceedings were had, to wit:

TUESDAY MORNING, *March 17th*, 1891.

Court met pursuant to adjournment.

Present and presiding, the honorable Howell E. Jackson, judge of the United States circuit court for the sixth judicial circuit.

HENRY HARRISON TAYLOR
vs.
THE UNITED STATES. } No. 872.

Be it remembered that this cause came on for hearing before the Hon. Howell E. Jackson, judge, presiding over and holding the United States circuit court for the sixth judicial circuit, in the northern division of the eastern district of Tennessee, at Knoxville, upon the petition, the
28 answer of H. B. Lindsay, district attorney for the United States, the affidavit of J. T. Carter, deputy clerk of the United States circuit court, and the affidavit of Jasper H. Peoples, deputy United States marshal for said eastern district of Tennessee; and it appearing therefrom that the petition of the plaintiff, Henry Harrison Taylor, was filed in this court on the 23rd day of December, 1889, under the act of March 3, 1887, and being chapter 359 of the pamphlet acts of Congress for 1886 & 1887, and that a copy of said petition was duly mailed to the Attorney-General of the United States at Washington, D. C., by registered letter, on the 23rd day of December, 1889, and that a copy of the same was also served upon and delivered to the said H. B. Lindsay, esq., district attorney for the United States for the said eastern district of Tennessee on the same day that said petition was filed, and affidavits thereof having been made and the receipt for said registered letter filed in this cause, as provided by law in such cases; and it also appearing that the defendant, by the said H. B. Lindsay, district attorney, as aforesaid, filed its answer to the petition in this cause on the 2nd day of July, 1890:

And thereupon, this cause coming on for hearing by order of the circuit judge, by and with the consent of both parties, and the same having been argued by counsel and considered of and understood by the court, and it

appearing to the court that the plaintiff, Henry Harrison Taylor, was,at the time of the filing of the petition in this cause and at the time of the rendition of the services charged for in his accounts, and still is and ever since hath been a citizen and resident of said division and district, and that during all of said time he was and still is the clerk of the United States circuit court for said eastern district of Tennessee, and that as such clerk he rendered services to the defendant as set forth in the petition and admitted in defendant's answer, and that the defendant became indebted to him as such clerk to a considerable amount in fees for such serv-
29 ices; and it further appearing that the petitioner rendered his accounts against the United States for some of the services claimed in the petition as fees as aforesaid, claimed to be due him from July 1st, 1887, to December 23rd, 1889, duly itemized as required by law, and that the same were examined by the First Comptroller of the Treasury at Washington, D. C., and that items thereof were disallowed as set forth in the petition, and that other items of said petition as therein set forth were not presented to said First Comptroller of the Treasury at Washington for allowance or disallowance, for the reason stated in said petition, that petitioner, owing to his knowledge of the said Comptroller's rulings disallowing similar charges, knew he would also disallow said charges in the petition set forth.

It also appearing to the court that the following charges in said petition have been allowed and paid to petitioner by the Treasury Department since the commencement of this suit, the same are withdrawn, to wit:

Certificates and seals to copies of mittimus, &c., in statement No. 115,953, sixth item of petition	$3.60
Captions to terms in final records, in statement No. 114,359, ninth item of petition	52.35
Orders, recognizances, &c., in statement No. 115,953, ninth item of petition	24.45
Affidavits to witnesses as to fees, in statement No. 115,953, twelfth item of petition	28.35
Fees on 71 capias writs, fourteenth item of petition	88.75
Making	$197.50

And it also appearing that the clerk, in subitem J of the ninth item in the petition, has made an error of $3.00 in addition, said sum of three dollars is disallowed.

And the court, therefore, being of the opinion that all of the first, second, third, fourth, fifth, seventh, eighth, tenth, eleventh, thirteenth, fifteenth, and sixteenth items of charges in said petition, and all of the sixth and twelfth items not heretofore allowed petitioner at the Treasury Department, and all of the ninth item of said petition except the
30 amount charged ($162.80) for recording subpœnas, the amounts ($76.80) heretofore allowed petitioner at the Treasury Department, and the error ($3.00) heretofore disallowed, are proper charges against the defendant, the United States, the same are allowed.

And the court being further of the opinion that the charge for recording subpœnas, as set forth in the ninth item of said petition, is not a proper charge against said defendant the same is disallowed.

And it further appearing to the court that said first item so allowed amounts to the sum of $40.75; the second item to the sum of $5.75; the third item to the sum of $3.00; the fourth item to the sum of $95.50; the fifth item to the sum of $285.40; the sixth item to the sum of $20.80;

the seventh item to the sum of $29.35; the eighth item to the sum of $6.00; the ninth item to the sum of $470.90; the tenth item to the sum of $6.15; the eleventh item to the sum of $3.00; the twelfth item to the sum of $31.05; the thirteenth item to the sum of $5.40; the fifteenth item to the sum of $2.20, and the sixteenth item to the sum of $60.75; and that the whole of said items or sums so allowed aggregate the sum of $1,066.00:

It is therefore considered, ordered, adjudged, and decreed that the said petitioner, Henry Harrison Taylor, have and recover of and from the United States said sum of one thousand and sixty-six dollars, with interest from this date at the rate of four per cent per annum, together with all the costs of this cause.

It is also considered, ordered, adjudged, and decreed that the charge for recording subpœnas in the ninth item of said petition, amounting to the sum of one hundred and sixty-two dollars and eighty-cents, is an improper and incorrect charge and the same is disallowed, and the action of the said First Comptroller with respect thereto is sustained.

Approved:
(Signed) HOWELL E. JACKSON,
Circuit Judge.

31 THURSDAY MORNING, *May 28th*, 1891.

Court met pursuant to adjournment.

Present and presiding the honorable D. M. Key, judge of the United States district court for the eastern and middle districts of Tennessee.

HENRY H. TAYLOR
vs.
THE UNITED STATES. } No. 872.

In this case came the defendant, the United States, by the district attorney, and prays an appeal to the Supreme Court of the United States, which is by the court granted.

It is therefore considered by the court that an appeal be granted in this case as prayed for, and the clerk will make out a certified transcript of the record in the case and cause the same to be forwarded to the Attorney-General at Washington, D. C., as required by law.

32 UNITED STATES OF AMERICA,
Eastern District of Tennessee, ss:

I, H. H. Taylor, clerk of the United States circuit court for the eastern district of Tennessee, do hereby certify that the foregoing 31 pages of typewritten matter contain a full true, and correct copy of all the record and proceedings had in said court in the cause of Henry Harrison Taylor vs. The United States, as the same appear of record and on file in my office.

Witness my hand and the seal of the said court, at office in Knoxville this 29th day of May, 1891.

[SEAL.] H. H. TAYLOR, *Clerk.*
By J. T. CARTER, *Dep. Clerk.*

(Indorsement on cover:) No. 795. The United States, appellant, vs. Henry H. Taylor. E. Tennessee C. C. U. S. Filed June 22, 1891.

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147 U.S. 695

Office Supreme Court U. S.
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JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1892.

THE UNITED STATES, APPELLANT,
v.
HENRY H. TAYLOR. } No. 795.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TENNESSEE.

BRIEF FOR APPELLANT.

In the Supreme Court of the United States.

OCTOBER TERM, 1892.

THE UNITED STATES, APPELLANT, v. HENRY H. TAYLOR. } No. 795.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TENNESSEE.

BRIEF FOR APPELLANT.

STATEMENT.

The claimant sued the United States in the court below for certain fees charged in his accounts as clerk of the United States circuit court for the eastern district of Tennessee, which had been disallowed by the First Comptroller of the Treasury Department in the adjustment of said accounts, notwithstanding they had been duly approved by the court as required by law.

The claims for said fees accrued after July 1, 1887.

The items embraced in the judgment are set forth in the findings of the court. (Rec., pp. 7–17.)

It is not found as a fact that the amount of the judgment in this suit, together with the emoluments paid appellee on the adjustment of his accounts at the Treasury Department, exclusive of proper expenses of office, would not exceed the maximum rate of compensation prescribed by law for his office, when properly apportioned in his emolument returns for the period covered by the services for which fees were allowed in the judgment.

ASSIGNMENT OF ERRORS.

1. The court below erred in its conclusions of law on the facts found that appellee is entitled to recover from the appellant for the following items set forth in the findings of fact, to wit, Items Nos. 1 and 2, 3 and 13, 4 and part 16, 12 and part 16, and 9.

2. The court below erred in ordering, adjudging, and decreeing that appellee should have and recover of and from the United States the sum of $1,060, with interest from date of said judgment at the rate of 4 per cent per annum, together with all costs of this cause.

ARGUMENT.

Before discussing the items above excepted to, we beg the indulgence of the court to present a few general propositions which, we think, should not be lost sight of in determining the rights of officers of the United States courts to be paid compensation out of the Treasury, according to the fee bill, Chapter XVI, Title XIII, of the Revised Statutes, applicable alike to most of the cases of this character.

The "fees" prescribed in that chapter, with perhaps a few exceptions which would be difficult to discover, and which, in respect to these propositions, we need not attempt to seek, are all taxable as costs either in civil or criminal causes, as the case may be, and as well where the parties to the suit are citizens or persons within the jurisdiction of the court as where the United States is a party to the proceedings or concerned therein. (Rev. Stats. 984.)

The law says that where the prevailing party is entitled to recover costs the latter "shall be taxed by a judge or clerk of the court, and be included in and form part of a judgment or decree against the losing party," and that "such taxed bills shall be filed with the papers in the cause." (Rev. Stat., 983.)

This rule applies to civil causes. It also applies to causes mentioned in section 974:

Costs are taxable on judgments rendered against defendants for fines, penalties, and forfeitures, and in criminal causes.

There are numerous provisions of law intended to prevent the multiplication of costs, *e. g.*, Revised Statutes, sections 920, 921, 977 to 982, 1024, 1027 to 1030. See also section 829, paragraph 25, as to names of witnesses in subpœnas. The policy is to minimize the costs of suits.

Referring to the fee bill, section 823 of the Revised Statutes says:

> The following and no other compensation shall be taxed and allowed to attorneys, solicitors, and proctors in the courts of the United States, to district attorneys, clerks, commissioners, witnesses, jurors, and printers in the several States and Territories, except in cases

> otherwise expressly provided by law. But nothing herein shall be construed to prohibit attorneys, solicitors, and proctors from charging to and receiving from their clients, other than the Government, such reasonable compensation for their services, in addition to the taxable costs, as may be in accordance with general usage in their respective States or may be agreed upon between the parties.

It is plain to be seen that the fees prescribed in the fee bill for district attorneys, clerks, marshals, and commissioners are taxable as costs; and when the United States prevails in a cause, that these costs are recoverable against the losing party, if such party should be assessed, as he ought to be, unless poverty or strongly mitigating circumstances relieve him from the taxation. Again, such costs are not payable to these officers; they belong wholly to the United States, and must be paid into the Treasury. (Rev. Stats., 3616, 3617.) Hence, the only personal interest that the officers of the courts have in them is the measure of compensation which they furnish for services performed. This measure is, or ought to be, dealt out fairly by the accounting officers of the Treasury Department from the appropriations made by Congress; and if the compensation is not sufficient, it is for Congress to enlarge it.

As it is a presumption of law that public officers will perform their duty faithfully, it is to be presumed that the clerk or the judge will tax all costs in causes in which the United States is a party or concerned, as fairly and evenly as where private parties only are concerned, and according to the same rule of assessment; that the district attorney will see that each properly taxable item goes into

the bill of costs, and that the bill is filed with the papers in the cause; and also, when such costs ought to form part of the judgment or decree of the court, that they are included in the judgment or decree; and, finally, that all proper steps are taken for the satisfaction of the judgment or decree.

We must assume that all these duties are faithfully performed. Therefore the compensation charged as fees by these officers in their accounts against the United States should include no items (with perhaps a few exceptions) that the clerk of the court could not conscientiously tax in bills of costs for prevailing parties who have obtained judgments or decrees carrying costs.

We think these elementary principles should not be lost sight of in pas-ing upon these fee causes. If there be in any case a vexatious multiplication of papers, certificates, seals, writs, process, copies, folios, entries, filings, or enlargements of records, it is not the United States alone that would be the most wronged party, but private citizens,—if the officers of the court perform their duty as to taxation of costs. It is, therefore, a grave matter to unnecessarily increase costs under such circumstances; and it is, we think, one not unworthy the serious consideration of even this august tribunal.

In the *Van Duzee Case* (140 U. S. R., 109) this court, notwithstanding the ruling as to prima facie proof announced in *Jones* vs. *United States* (134 U. S. R., 488), disallowed some charges for services certified to in accounts under the act of February 22, 1875, as having been necessarily performed, on the ground that they were not necessary.

Therefore, we confidently expect that no item in any account of the claims here presented which could be included in a bill of costs, will be allowed by this court against the United States, if this same item would not, in a proper case, be fairly taxable in a bill of costs where the suit or proceedings was between private parties.

ITEMS EXCEPTED TO IN THE ASSIGNMENT OF ERROR.

We discuss these items in the order in which they appear in the findings of fact. (Rec., pp. 7–19.)

Items 1 *and* 2.—These items were for taking acknowledgements, in criminal cases, of defendants and their sureties to bail bonds, for appearance before the court for trial, such parties having been duly arrested by the marshal on process and taken before the clerk for bail. It appears from the petition that these acknowledgements were taken jointly, and that one fee was allowed for each case by the accounting officers of the Treasury Department.

This court held, in *United States* v. *Ewing* (140 U. S. R., 142), that only one fee can be charged for such an acknowledgement.

Items 3 *and* 13.—These items are for certificates of the clerk and seals to certain copies of orders of court directing the marshal to pay witnesses and jurors. The like charge was passed upon in *United States* v. *Van Duzee* (140 U. S. R., 169), and the charge for the seal disallowed as an unnecessary expense. But *quære*, Was there any necessity for copies of the orders? Section 855, Revised Statutes, says that "the marshal shall, on the order of

the court, to be entered on its minutes," pay the jurors and witnesses. It does not say that he shall pay on copies of the order. Is not the marshal present in the court? Are not the minutes open to him? In such case these copies would seem to be an unnecessary expense. A copy is not the best evidence when the original is at hand.

Items 4 *and part* 16.—This item is for filing discharge tickets of witnesses issued by the district attorney. This charge does not seem to be wholly unobjectionable. To make it so we think it should appear affirmatively in cases where two or more witnesses in a cause were discharged at the same time the names of the witnesses were included in one ticket. The inference from the finding is that a ticket was given to each witness. The form runs, "is discharged as a witness on behalf of the United States." The amount of the charge supports the inference, and it is further supported by the charge for 287 tickets in a single account as set forth in item "fourth." (Rec., p. 2.) We think it is usual to discharge all the witnesses in an ordinary case at the same time. And while it may be said that the district attorney, and not the clerk, is the responsible party for multiplying such papers, we think that two or more tickets discharging witnesses in the same cause at the same time ought to be regarded as one paper only. They are to be filed with the other papers in the cause. Besides this, tickets are a step in the taxation of costs, and the service of the clerk is included in the fee for making dockets, etc.

Items 12 *and part of* 16.—This charge is for affidavits of witnesses as to the number of days of attendance and miles traveled.

While the statute allows the clerk a fee of 10 cents for administering an oath or affirmation, except to a juror, it is submitted that this charge is for a service covered by the fee for making dockets, etc. The clerk must be satisfied as to attendance and mileage of witnesses before he can tax them as costs.

Item 9 (Rec. p. 14, XI).—This item is for making final records in criminal cases. "Nearly all criminal cases in this court [says the finding] are for violations of what are known as the internal-revenue laws of the United States." Of course, a charge for making a final record of a cause is proper. But the question is as to what complaints, pleadings, process, writs, documents, orders, or papers should go into the final record of a criminal cause, when the policy of the law is to minimize costs. It would seem that such only as may be necessary to show the jurisdiction of the court and the regularity of the proceedings would be sufficient for final records of these cases, especially as there is no appeal provided for. The various records made are set forth in "ninth" item A to K (Rec., pp. 2 and 3). The findings allow in the aggregate for this service, $639.80. We except to the charges as allowed.

The court below seems to have assumed that every paper filed in a cause and every service of the officer in connection with the case is a part of the "final record" of the case and that the officer is entitled to incorporate everything therein, thereby greatly increasing the costs where "final records" are required. In our opinion this involves an entire misconception of the purpose of a final record. It was at common law the official statement of

the proceedings and transactions of the court drawn up by its officers and deposited in its treasury *in perpetuam rei memoriam*. In time it grew to become a copy of the papers showing jurisdiction, pleadings, and the statement of the action of the court. Official greed now seeks to again enlarge it by having it again state the unimportant steps taken, not by the court alone, but by the officer himself, in matters already appearing on the minutes and records from day to day in the administration of the court, and in no way connected with the decision of the issue. This test is the common-law one and is inferentially supported by the language of this court in *Williams* v. *Norris* (12 Wheat., 117, 119). As well and better might the depositions be made a part of this record and taxed against the United States as all the proceedings before the commissioner who holds to bail; the order of the commissioner is not the order of a court nor are his proceedings those of a court. The citation (Rec., p. 16) of the official oath from Revised Statutes, section 794, is ingenious, but neither accurate nor applicable. The oath is confined to the orders, decrees, judgments, and proceedings *of the said court*, not the action of some person not exercising judicial functions. This oath is strongly suggestive of the invalidity of several other items here charged for; they are mere memorandums and not necessary to the permanent record.

II.

AS TO THE SECOND ASSIGNMENT OF ERROR.

The grounds of error there presented have been discussed in the brief for appellants in *United States* v. *Fletcher*

(No. 783) submitted at the present term of this court under Rule 20, which we respectfully ask the court to adopt as a part of this brief, so far as it relates to this assignment.

FELIX BRANNIGAN,
Assistant Attorney.

CHARLES H. ALDRICH,
Solicitor-General.

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CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1892.

No. 795.

THE UNITED STATES, Appellant,

vs.

HENRY H. TAYLOR.

BRIEF FOR APPELLEE.

GEORGE A. KING,
Attorney for Appellee.

McQUEEN, PR.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1892.

THE UNITED STATES, Appellant,
v.
HENRY H. TAYLOR. } No. 795.

BRIEF FOR APPELLEE.

I. Statement of the Case.

Henry H. Taylor, on December 23, 1889, filed his petition (Record, pp. 1–5) against the United States, in the Circuit Court of the United States for the Eastern District of Tennessee, for the recovery of fees accruing to him as Clerk of said Circuit Court of the United States, for the said Eastern District of Tennessee, amounting to $1,429.30.

The United States appeared, July 2, 1890, by the District Attorney and (p. 6) answered, admitting the performance of the services sued for, but denying that the same were necessarily done, or that there is or was any law authorizing the payment of the fees sued for.

On March 17, 1891, the court entered its findings of fact (pp. 17, 18), conclusions of law (pp. 18, 19), and judgment (p. 19). By this it appears that since the com-

mencement of the suit amounts aggregating $197.50 had been allowed at the Treasury, and that there was an error of calculation of $3, making $200.50 to be deducted from the claim, leaving in controversy the sum of $1,228.80. Of this amount, $162.80, constituting a single item for recording subpœnas, was disallowed, leaving a balance of $1,066, for which sum judgment was rendered. The opinion (pp. 7–17) is by Hon. Howell E. Jackson, Circuit Judge, and contains an elaborate discussion of all the items of the case.

On May 28, 1891, an appeal (p. 19) was taken by the United States.

II. Brief of Argument.

As no appeal was or could be taken by the claimant from that portion of the judgment which was adverse to him, the only questions arising on this appeal are as to the correctness of the allowance of the items which the Circuit Court adjudged in his favor. The very elaborate opinion of the learned Circuit Judge, discusses the whole case in all its aspects so fully that it seems hardly necessary for counsel for the appellee to go at length over the same ground. In the conclusion of the opinion the case of *United States* v. *Jones*, 134 U. S. 483, 488, is referred to as maintaining the view that the approval of the account of an officer of court by a Circuit Court of the United States, under the act of February 22, 1875, 1 Supp. Rev. Stat. 2d ed. p. 65, constitutes *prima facie* evidence of the correctness of the items, and requires clear and unequivocal proof of mistake on the part of the court, before it can be overruled. The presumptions, therefore, are all in favor of the correctness of the allowances made by the court below.

As it has been stipulated that this case be submitted on printed arguments under the 20th rule, and that the brief

on behalf of the appellee shall be filed by December 1, 1892, it might, under ordinary circumstances, in the absence of an assignment of errors, be somewhat embarrassing for counsel for appellee to discuss every item of the claim in detail, not knowing which of them are objected to on behalf of the United States. From such embarrassment, however, the elaborateness of the opinion of the court below, fully relieves counsel, and enables him merely to refer to that opinion, pointing out only such items therein, as, in the opinion of counsel, are affected by subsequent decisions, of which that court had not the advantage in framing its conclusions and judgment herein.

It will be convenient to number the items according to the numbers of the paragraphs in the opinion of the court below.

1. Taking acknowledgments.

These were allowed by the court below, pages 7 to 9, at the rate of 25 cents for each person making the acknowledgement. In *United States* v. *Ewing*, 140 U. S. 142, item 2, p. 146, this court held that "the taking of such acknowledgment in a criminal case by the accused and his sureties, is a single act, for which only one fee can be charged." *Churchill* v. *United States*, 25 C. Cls. 1, is referred to, without further argument, as sustaining this ruling. On examining that case, however, it will appear, item 3, p. 6, that the ground upon which the ruling was placed by the Court of Claims, was that "although the question is not free from doubt, the court is not disposed to disturb the practice of the Treasury Department." The opinion, however, in the case now before the court throws new light on the question of practice before the Treasury Department, as follows:

"Previous to the late First Comptroller of the Treasury, this fee for an acknowledgment taken to a bail bond by

each and every party to it was never questioned and all such fees were always allowed and paid; and the rulings on this point during his administration, and since, as this record shows, have not been uniform."

In this view, the result in the *Churchill* case should have been an allowance of this item, and had the practice of the Treasury Department on this subject been as clearly presented, either to that court in the Churchill case or to this court in the Ewing case, as it is now shown in this case, a favorable conclusion would probably have been reached. A reconsideration of the adverse decision on this character of items, as made in the Ewing case, is therefore respectfully requested.

In *United States* v. *McDermott*, 140 U. S. 151, it was said in regard to this question of practice of the Treasury Department, as affecting the construction of the statutory fee bill, item 3, page 154:

"It appears to have been the practice of the Department of Justice for the past twenty years to allow these as proper charges for drawing complaints, and if there were any doubt as to the propriety of their allowance, such doubt, in view of this long continued practice, should be resolved against the Government."

The ruling of the court below, sustaining these items, should therefore, be affirmed.

2. Certificates of the clerk and seals of the court, to orders directing the marshal to pay jurors, witnesses, etc. In *United States* v. *Van Duzee*, 140 U. S. 169, item 6, page 174, this court disallowed the charge for affixing the seal, though the charge for certificate was admitted to be proper. But see the able reasoning of the court below (pp. 9, 10), in favor of the allowance of both charges.

3. Authentication of copies of *mittimus* writs.

4. Filing discharge tickets given by the District Attorney to witnesses.

5. Affidavits of Government witnesses as to their travel and attendance.

6. Error in computation.

As to all these items, see the opinion of the court below, pp. 10, 11.

7. Filing papers from the office of the Commissioner in criminal cases. The opinion of the court below, pages 11, 12, discusses this item very fully, but in view of the opinion of this court in *United States* v. *Van Duzee*, 140 U. S. 169, item 1, pages 170, 171, allowing similar items, we presume that the Attorney-General will assign no error on their allowance in this case.

8. Copies of orders made by the court upon the marshal to bring prisoners to the court for trial.

9. Docket fees.

These items are fully discussed in the opinion of the court below, pages 13, 14.

10. Entering respites of jury and orders of continuance from day to day.

This item is discussed in the opinion (p. 14), and is sustained in principle by *United States* v. *VanDuzee*, item 7, 140 U. S. 199, 200.

11. Making final records in criminal cases.

This item is discussed at considerable length in the opinion below, pages 14–16, and all the charges made under this head were allowed, with the exception of so much as was charged for recording subpœnas. Item 9, of *United States* v. *Van Duzee*, 140 U. S. 169, 176, fully sustains this allowance. It is there held that where a rule of the court requires the clerk to make up these final rec-

ords, it is obligatory upon him, and that he is entitled to charge for the service. It seems, from the statements in the opinion herein (p. 14), that the rules and practice of the Circuit Courts of the United States in Tennessee, require such final record to be made up, and it is clear, therefore, that the claimant is entitled to charge for them.

It is submitted that the judgment of the Circuit Court should be affirmed.

GEORGE A. KING,
Attorney for Appellee.